



PUBLIC LANDS APPEAL BOARD

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2020 ABPLAB 6

May 12, 2020

Via E-Mail

Mr. John Harms
Mr. Shahrukh Sheikh
JH Drilling Inc.
#200, 3428 – 99 Street
Edmonton, AB T6E 5X5
(*Appellant*)

Ms. Alison Altmiks
Alberta Justice and Solicitor General
Environmental Law Section
8th Floor, Oxbridge Place
9820 – 106 Street
Edmonton, AB T5K 2J6
(*Representing the Director, AEP*)

Dear Gentlemen and Ms. Altmiks:

**Re: Decision Letter* – JH Drilling Inc./Refusal to Issue SML 080032 and
DLO 081410 - Our File No.: PLAB 19-0249**

The Board acknowledges receipt of the attached correspondence dated March 9, 2020, from Mr. Harms.

This is the Board's decision regarding the request by the Director, Lower Athabasca Region, Operations Division, Alberta Environment and Parks (the "Director") to dismiss the appeal (PLAB 19-0249). The Board grants the Director's requests to dismiss the appeal. This decision was made by Mr. Gordon McClure, Chair and Appeals Coordinator for the Board.

Background

JH Drilling Inc. (the "Appellant") applied to the Director for Surface Materials Lease 080032 (the "SML") and Departmental Licence of Occupation 081410 (the "DLO") in 2008. As the applications for the SML and DLO were filed in 2008, the law and procedure under the *Dispositions and Fees Regulation*, Alta Reg. 54/2000 applies as opposed to the law and procedure under the *Public Lands Administration Regulation*, Alta Reg. 187/2011 ("PLAR"), which came into force in 2011.¹

On January 28, 2020, the Director issued a decision letter (the "Decision") refusing to issue the SML and the DLO for the following reasons:

* Cite as: *J.H. Drilling Inc. v. Director, Lower Athabasca Region, Operations Division, Alberta Environment and Parks* (12 May 2020), Appeal No. 19-0249-DL1 (A.P.L.A.B.), 2020 ABPLAB 6.

¹ Section 237(5) of PLAR states:

- none of the three Conservation Reclamation Business Plans (“CRBP”) the Appellant submitted with the applications for the SML and DLO met the requirements outlined in the *Guidelines for Acquiring Surface Material Dispositions on Public Lands* (2008). The Director noted “[m]ultiple requests for information have also been sent to address numerous deficiencies over a series of years and many have not been adequately addressed.”²
- information regarding the scale of mapping, the direction of drainage flow, and contour lines, as required by the *Field Guide to Ecosites of North Alberta* policy and directives, were missing or incomplete;
- the CRBP contained contradictory statements and statements showing lack of preparation for a reclamation strategy and wildlife considerations;
- vegetation referenced in the CRBP was not the same as the actual vegetation present on the land; and
- the Caribou Protection Plan, which is expected to be unique for each site, was used 17 different times and was too general.

In the Decision, the Director stated she refused to issue the SML and DLO under section 211(c) of PLAR.³

On February 11, 2020, the Appellant filed a Notice of Appeal with the Board regarding the refusal to issue the SML and DLO. Specifically, the Appellant requested “the cancellation letter be set aside” and that the Board “approve the lease as it was approved in 2011, 2014, and 2015.”⁴ The Board acknowledged receipt of the Notice of Appeal and requested copies of the Alberta Environment and Park’s record, including all documents and all electronic media that the Director reviewed and were available to the Director when making her Decision, including policy documents.

On February 20, 2020, the Director wrote to the Board and stated:

“It has come to my attention that as the applications for [the SML and DLO] were initially made in 2008, the applications were required to be considered under the former *Dispositions and Fees Regulation* pursuant to the transitional provisions in section 237(5) of the *Public Lands Administration Regulation*. A new decision regarding the applications for [the SML and DLO] will be rendered in due course.”

The Director also stated “further steps in the appeal should not be required....”⁵ The Board interpreted the Director as suggesting that, as her Decision was withdrawn, the appeal is now moot.

² Director’s Decision Letter January 28, 2020, at page 1.

³ Section 211 of PLAR provides in part:

“The following decisions are prescribed as decisions from which an appeal is available:

(c) a refusal to issue a disposition or to renew or amend a disposition applied for under the Act;”

⁴ Appellant’s Notice of Appeal at page 3.

⁵ Director’s letter February 20, 2020.

Enclosed with the Director's February 20, 2020 letter to the Board, was a copy of a letter the Director sent to the Appellant on the same date, advising the Appellant:

"The applications for these dispositions were made March 27, 2008 and August 27, 2008 respectively, which predates the *Public Lands Administration Regulation* (PLAR). The applications were required to be considered under the former *Dispositions and Fees Regulation* in accordance with the transitional provisions in section 237(5) of the *Public Lands Administration Regulation*.

A new decision regarding the applications for [the SML and DLO] will be made and communicated to you."⁶

On February 26, 2020, the Board acknowledged the Director's February 20, 2020 letter and set a process for the parties to provide written submissions on the Director's intention to withdraw her decision and reconsider the applications for the SML and DLO under the *Dispositions and Fees Regulation*. The Board asked the Appellant to answer the following questions:

1. What is meant by JH Drilling's response in section 20 of the Notice of Appeal: "Approve the lease as it was approved in 2011, 2014 and 2015"?
2. Does JH Drilling accept the withdrawal of the Director's decision to refuse to issue SML 080032 and DLO 081410? If not, please explain why.

The Board also asked the Director to provide details of any dispositions, approvals, or authorizations that may have been issued for the SML and DLO.

Submissions

The Appellant responded to the Board's questions on March 2, 2020. In response to the first question, the Appellant explained it did not mean the SML and DLO were issued formally, only that the SML and DLO had been approved internally. In response to the second question, the Appellant stated it did not accept the Director's withdrawal decision, if it meant withdrawing its Notice of Appeal. The Appellant requested to see the new decisions before withdrawing its Notice of Appeal.

The Director responded on March 4, 2020, and confirmed no formal dispositions were issued for the requested SML and DLO. The Director indicated that prior to PLAR, there was a policy stage in the aggregate application process in which an application for an aggregate lease could be "approved in principle."

The Appellant responded to the Director's letter on March 9, 2020. The Appellant argued the Director referred the Appellant to the Board, which indicated the Director accepted the authority of the Board. The Appellant said the Director chose the Board as the forum for the

⁶ Director's letter February 20, 2020 to the Appellant.

appeal. The Appellant submitted it complied with the instructions from the Director and, therefore, the Director is “estopped” from changing her position and advancing a new position.⁷ The Appellant asked if the Board has the legislative authority to hear the appeal. The Appellant submitted there were no other appeal forums available to it under the *Dispositions and Fees Regulation* as Alberta Environment and Parks (“AEP”) abolished its “old three-step” appeal procedure. The Appellant argued without the Board hearing the appeal, there was no procedural fairness as the appeal would not be heard.

Analysis

Section 123(5)(b) of the *Public Lands Act*, R.S.A. 2000, c. P-40, states in part: “[t]he appeal body may dismiss a notice of appeal if ... for any other reason the appeal body considers that the notice of appeal is not properly before it.”

The applications for the SML and DLO, which are the subject matter of the appeal, were filed while the *Dispositions and Fees Regulation* was in force. Section 237(5) of PLAR provides:

“Where on the coming into force of this Regulation an application for a disposition under the *Dispositions and Fees Regulation* (AR 54/2000) has been made but not yet determined, the application is to be dealt with in accordance with that Regulation as if it had remained in force and had not been repealed by this Regulation.”

The Board finds that as the applications for the SML and DLO were made, but had yet to be determined when PLAR came into force, they are required by PLAR to be handled in accordance with the *Dispositions and Fees Regulation*. Therefore, the Board finds the appeal is not properly before the Board.

In its Notice of Appeal and in its submissions, the Appellant stated the SML had been “approved internally” by AEP, in 2011, 2014, and 2015. The Appellant referred to payments it had to make as examples of the SML being approved “internally.”

The Director responded that prior to PLAR, AEP’s review process for an aggregate disposition application included a policy stage that was referred to as “approved in principal [sic],” which did not mean a disposition had been issued, or that final approval of a disposition was guaranteed.⁸

The Board finds any “internal” approvals and the requirement by AEP for the Appellant to pay fees are stages in AEP’s application process and are not indications of final approval of the SML or DLO. The Appellant is experienced with the aggregate application

⁷ In the Appellant’s letter dated March 9, 2020, the Appellant commented that the cancellation letter of the Director referred the Appellant to the Board, in order to appeal the Director’s decision. The Appellant argued that having complied with this instruction, the Director could not now claim that the Board did not have jurisdiction.

⁸ Director’s letter March 4, 2020.

process and ought to be aware that an application can be considered approved only when the Director issues a formal disposition.

The Board finds the applications for the SML and DLO were submitted under the *Dispositions and Fees Regulation*. Section 237(5) of PLAR is clear the Board does not have jurisdiction to hear an appeal of an application for a SML or DLO submitted under the *Dispositions and Fees Regulation*. Therefore, the Board does not have jurisdiction to hear the Appellant's appeal.

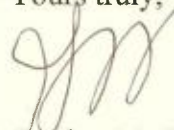
The Appellant argued dismissal of the appeal would leave the Appellant with "no other appeal procedures" and "...no opportunity to be heard, no procedural fairness, no administrative justice."⁹ The Board observes that an inability to appeal to the Board regarding these SML or DLO does not impede the Appellant's ability to seek remedies. The Appellant may withdraw its applications under the *Dispositions and Fees Regulation* and submit new ones under PLAR, or it may continue its present applications and have as a potential remedy, the option of judicially reviewing the decision of the Director.

Decision

The Board has reviewed the submissions of the parties with respect to the Director's withdrawal of her decision, and has decided to dismiss the appeal. The Board finds that the appeal is not properly before the Board as per section 237(5) of PLAR.

Please do not hesitate to contact the Board if you have any questions. We can be reached toll-free by first dialing 310-0000 followed by 780-427-6207, by e-mail at PLAB@gov.ab.ca, or by fax at 780-427-4693.

Yours truly,



for Gordon McClure
Chair and Appeals Coordinator
Public Lands Appeal Board

Att.

The information requested by the Public Lands Appeal Board is necessary to allow the Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of this appeal. The information you provide will be considered a public record.

⁹ In the Appellant's submission dated March 9, 2020, the Appellant commented that the "old three step" appeal procedures [that had largely existed in Alberta Environment and Parks policy] had been negated.